LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 10 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 890

CLAYTON CHEMICAL & PACKAGING CO.,

Petitioner,

against

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BROOKS & BROOKS
39 Broadway
New York, New York 10006

By JOHN JOSEPH McDERMOTT
Counsel for Petitioner

JOHN D. ROOD
Of Counsel

BLANK PAGE

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT	3
REASONS FOR GRANTING PETITION	4
CONCLUSION	7

TABLE OF AUTHORITIES

Cases:

Bryan v. United States, 338 U. S. 552, 94 L. ed. 335, 70 S. Ct. 317	7
Clayton Chemical & Packaging Co. v. United States, 49 Cust. Ct. 409, Reap. Dec. 10347	2
Equitable Life Assurance Soc. v. Mercantile Commerce Bank & Trust Co., et al., 143 F. 2d 397	6
Fessenden v. Fessenden, 320 Ohio App. 16, 165 N. E. 746	5
Finn v. Cassidy, 165 N. Y. 584, 594, 59 N. E. 311, 53 L. R. A. 837	4
Ford Motor Co. v. Labor Board, 305 U. S. 364, 83 L. ed. 221, 59 S. Ct. 301	7
Norris v. Clinkscales, 47 S. C. 488, 25 S. E. 797	4

BLANK PAGE

LIBRARY, SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 10 1955
JOHN T. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1954

No. 890

CLAYTON CHEMICAL & PACKAGING CO.,

Petitioner,

against

THE UNITED STATES,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BROOKS & BROOKS
39 Broadway
New York, New York 10006

By JOHN JOSEPH McDERMOTT
Counsel for Petitioner

JOHN D. ROSS
Of Counsel

BLANK PAGE

PAGE

People ex rel. Totalis v. Craver, 20 N. Y. S. 533, 537, 174 Misc. 325 5
Pittsburgh Equitable Co. v. Paul C. Loeber Co., 160 F. 2d 721, 728 5
Pringle v. Neff, 112 Pa. Super. 547, 172 A. 26 6

Schroeder v. Brandon, 141 Tex. 319, 172 S. W. 2d 488 5

Thommen v. Aldine, 302 Pa. 409, 153 A. 750 6

United States v. Clayton Chemical & Packaging Co., 52 Cust. Ct. 620, ARD 169 2
United States v. Hensel, Bruckmann & Lorbacher Inc. 2 Cust. Ct. 846, R. D. 4523 5
United States v. M. Minkus, 16 Ct. Cust. Appls. 263, T. D. 42869 (reversing and remanding the case where single judge erroneously admitted a record over objection) 7

Vaughan v. State, 58 Ark. 353, 371, 24 S. W. 885 4

Other Authorities:

Hearings on H. R. 3321, Senate Finance Committee, 63d Cong. 1st Sess. 2188 (1913) 5
5 Amer. Juris., 2d *Appeal and Error*, 973 6
5 Amer. Jur., 2d p. 963 7
5A C. J. S., Appeal and Error, 1583 5
5B C. J. S., 1940, 1941 6

Tariff Act of 1930
Section 402(e) as amended 3
Section 501 3

United States Code
Section 1256, Title 28 (62 Stat. 928) 2
Section 2633, Title 28 (62 Stat. 980) 3, 5

IN THE

Supreme Court of the United States

October Term, 1965

No. .....

CLAYTON CHEMICAL & PACKAGING CO.,
Petitioner,

against

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Clayton Chemical & Packaging Co., prays that a writ of certiorari issue to review the judgment of the United States Court of Customs and Patent Appeals entered June 24, 1965.

Opinions Below

The opinion of the single judge sitting in reappraisement, Chief Judge Oliver (R.), is reported in *Clayton Chemical & Packaging Co.* v. *United States,* 49 Cust. Ct. 409, Reap. Dec. 10347.

The opinion of the United States Customs Court, Second Division, Appellate Term (R.), is reported in *United States* v. *Clayton Chemical & Packaging Co.,* 52 Cust. Ct. 620, ARD 169.

The opinion of the United States Court of Customs and Patent Appeals (R.) will be reported in 52 C. C. P. A. ——, C. A. D. 867, and is reported in Treas. Dec. Advance Sheets, dated December 9, 1965, No. 49, page 62.

Jurisdiction

The judgment of the United States Court of Customs and Patent Appeals was entered on June 24, 1965 (R.). A petition for rehearing was denied October 12, 1965. The jurisdiction of this Court is invoked under Section 1256, Title 28, United States Code (62 Stat. 928).

Questions Presented

1. Was the United States Court of Customs and Patent Appeals correct in overruling the finding of the trial court that the attendance could not reasonably be had of the witnesses executing Exhibits 7 through 20?
2. Did that Court err in reversing the judgment of the United States Customs Court without ordering a new trial to permit petitioner to introduce parol evidence in lieu of the excluded affidavits?

Statute Involved

Section 2633, Title 28, Judiciary and Judicial Procedure, U. S. Code (62 Stat. 980), provides in part as follows:

> "In finding the value of merchandise, in reappraisement proceedings before a single judge of the Customs Court, affidavits and depositions of persons whose attendance cannot reasonably be had, * * * may be admitted in evidence * * *".

Statement

Certain importations by the petitioner of a coal tar chemical compound known as Phenidone, were appraised by the customs authorities on the basis of United States value as defined in Section 402 (e) Tariff Act of 1930 as amended, at various prices ranging from $15.87 per pound to $24.11 per pound. While not disputing that United States value was the proper basis of value, the importer disagreed as to the amounts thereof and filed appeals to reappraisement pursuant to Section 501 of the Tariff Act of 1930.

At a hearing before a single judge of the United States Customs Court, plaintiff's exhibits 7 through 20, which were affidavits of persons residing in the United States who had purchased the Phenidone from the importer, were admitted in evidence pursuant to Section 2633, Title 28, U. S. Code, *supra*.

Thereafter, a judgment in favor of the plaintiff was appealed to the Second Division of the United States Customs Court which Court affirmed the judgment of the

single judge in favor of the plaintiff and expressly held that said affidavits had been properly admitted in evidence.

Upon appeal to the United States Court of Customs and Patent Appeals the Court held that the affidavits should not have been admitted in evidence; that without said affidavits there was no substantial competent evidence of record to sustain the lower Court's finding; and that the judgment should be reversed.

Two judges of the Court dissented, Judge Smith writing an opinion in which he found that the affidavits had been properly admitted and that the decision of the Court below should have been affirmed.

Reasons for Granting Petition

The question of whether the attendance of the witnesses could or could not reasonably be had was a question of fact. Since it was a fact preliminary to the determination of the admissibility of evidence, it was a fact to be determined by the Court.

> *Norris* v. *Clinkscales,* 47 S. C. 488, 25 S. E. 797;
> *Vaughan* v. *State,* 58 Ark. 353, 371, 24 S. W. 885;
> *Finn* v. *Cassidy,* 165 N. Y. 584, 594, 59 N. E. 311, 53 L. R. A. 837.

Judge Almond, writing for the majority in the Court below, agreed.

> "Whether or not attendance may reasonably be had is a factual matter to be determined by the Court, when and before which the issue is properly raised." (R.)

The decision to admit or not admit is clearly one within the discretion of the trial court.

The word in Section 2633, Title 28, is "may"—clearly permissive.

Hearings on H. R. 3321, Senate Finance Committee, 63d Cong. 1st Sess. 2188 (1913);
United States v. *Hensel, Bruckmann & Lorbacher Inc.*, 2 Cust. Ct. 846, R. D. 4523;
Opinion of Judge Almond, *supra* (R.).

In the absence of a showing that such discretion was clearly abused, the action of the trial court is not subject to reversal.

Fessenden v. *Fessenden*, 320 Ohio App. 16, 165 N. E. 746;
Schroeder v. *Brandon*, 141 Tex. 319, 172 S. W. 2d 488;
5A C. J. S. Appeal and Error, 1583.

The Court below should not have substituted its own discretion for that discretion vested in the trial court.

People ex rel. Totalis v. *Craver*, 20 N. Y. S. 533, 537, 174 Misc. 325.

Nothing in the record indicates any abuse of discretion or tends to impugn the presumption that the discretion was properly exercised.

Pittsburgh Equitable Co. v. *Paul C. Loeber Co.*, 160 F. 2d 721, 728.

Assuming *arguendo* that the United States Court of Customs and Patent Appeals had the right to and properly

did exclude the affidavits, its judgment of reversal was erroneous.

By virtue of the Court's judgment, petitioner finds itself in the position of having been denied the opportunity of introducing evidence to take the place of the evidence admitted at the trial but excluded by the Appellate Court.

Clearly, equity and justice require that this opportunity be afforded, an opportunity which petitioner would have had if the Trial Court had ruled against the admission of said affidavits.

Where, by reason of an erroneous ruling admitting certain evidence, a party is induced to refrain from introducing other competent evidence, he will be awarded a new trial in order to present such other evidence.

> *Pringle* v. *Neff,* 112 Pa. Super. 547, 172 A. 26;
> *Thommen* v. *Aldine,* 302 Pa. 409, 153 A. 750;
> *5B C. J. S.,* 1940, 1941.
> *5 Amer. Juris. 2d Appeal and Error,* 973.

"The plaintiff relied upon the correctness of the ruling of the Court admitting the book and did not furnish other competent evidence to make out a necessary element of his case, and should not be penalized for so doing."

> *Pringle* v. *Neff, supra*;
> *Equitable Life Assurance Soc.* v. *Mercantile Commerce Bank & Trust Co., et al.,* 143 F. 2d 397.

It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied.

Ford Motor Co. v. *Labor Board,* 305 U. S. 364, 83 L. ed. 221, 59 S. Ct. 301;
Bryan v. *United States,* 338 U. S. 552, 94 L. ed. 335, 70 S. Ct. 317;
5 Amer. Jur. 2d, p. 963.

The United States Court of Customs and Patent Appeals has itself so ruled.

United States v. *M. Minkus,* 16 Ct. Cust. Appls. 263, T. D. 42869 (reversing and remanding the case where single judge erroneously admitted a record over objection).

Conclusion

It is respectfully submitted that the judgment of the Court below is erroneous and that the petition herein should be granted.

If this Court should determine that the Court below correctly overruled the finding of the United States Customs Court as to the admissibility of Exhibits 7 through 20, but that the Court below erred in not ordering a new trial, it is respectfully prayed that the petition be granted summarily and the cause remanded forthwith.

Respectfully submitted,

BROOKS & BROOKS

By JOHN JOSEPH MCDERMOTT
Counsel for Petitioner

JOHN D. RODE
Of Counsel

Dated, New York, New York, December, 1965.